



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 25, 1998

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-2308

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118232.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "[a]ll documents, correspondence, memoranda," and a variety of other information concerning the "EPA approval of the TNRCC discharge program (NPDES authorization)." In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.¹ You claim that the requested information is excepted from required public disclosure based on sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the arguments and exceptions you raise and reviewed the submitted information.

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4(1986).

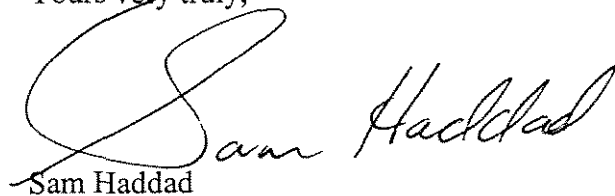
You argue that the requested information is related to anticipated litigation concerning "the State of Texas' application for the Environmental Protection Agency's (EPA) approval of National Pollutant Discharge Elimination System (NPDES) authorization." In support of your assertion, you have submitted a document in which Mr. Barry R. McBee, commission chairman, states that "[t]here is an expectation . . . that if the program is given to Texas, there will be a suit filed to oppose authorization of Texas running this program with a whole host of issues being introduced." In addition, the assistant attorney general representing the commission, Mr. Brian Berwick, and the Natural Resources Division Chief, Ms. Karen W. Kornell, have advised our office that litigation is anticipated in this matter. Furthermore, Ms. Kornell has advised our office that "the documents submitted . . . by the TNRCC . . . relate to the anticipated litigation." We conclude that litigation is reasonably anticipated and that the requested information relates to anticipated litigation. Therefore, you may withhold the submitted information in Exhibits G, H, and I, as well as the other documents, for which the Natural Resources Division has claimed section 552.103 as an applicable exception.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we resolve your request under section 552.103, we need not address your other claimed exceptions at this time. We are resolving this matter with this informal letter ruling

rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with the first name "Sam" being more prominent than the last name "Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref.: ID# 118232

Enclosures: Submitted documents

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